HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S136 of 2025

BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

and

WEB3 VENTURES PTY LTD ACN 655 090 869
Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. **Investment facility (s 763B(a)(i) or (iii))**: Does a person (the investor) "make a financial investment" as defined in s 763B(a)(i) or (iii) of the *Corporations Act 2001* (Cth) (**Act**) if the investor provides money's worth (here, cryptocurrency) to a business whose business model is to: (a) take the money's worth from investors in exchange for an agreed fixed rate of interest and return of the AUD value of the money's worth at a later time; (b) provide the money's worth to another for a higher rate of return; (c) use or intend to use the return it receives from the on-provision to pay the fixed rate of interest to the investor; and (d) retain the difference as its profit?

3. **Derivative (s 761D(1)(c) and s 761B)**: Is a product that is offered in accordance with terms that provide for the mandatory conversion of cryptocurrency into Australian dollars (**AUD**) on exiting the product (with the consequence that the value of the product varies depending on the exchange rate between AUD and the particular cryptocurrency) a derivative as defined in s 761D of the Act, even if some investors in fact exited the product without such a conversion?

PART III: SECTION 78B NOTICE

4. No notices under s 78B of the *Judiciary Act 1903* (Cth) are required.

PART IV: CITATIONS OF DECISIONS BELOW

5. The decision of the primary judge is *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* (2024) 172 ACSR 327; [2024] FCA 64 (Jackman J) (**PJ**).

6. The decision of the Full Court of the Federal Court of Australia is *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd* (2025) 308 FCR 552; [2025] FCAFC 58 (O'Callaghan, Abraham and Button JJ) (**FC**).

PART V: MATERIAL FACTS

7. The Respondent, Web3 Ventures Pty Ltd trading as **Block Earner**, operated an online platform through its website and mobile telephone application by which it offered cryptocurrency-related products (PJ[1], CAB 8; FC[14], CAB 104). During the period 17 March 2022 to 16 November 2022 (**Relevant Period**), Block Earner issued a product called "**Earner**"[1] (PJ[1], CAB 8; FC [6], CAB 102).

8. The Earner product allowed customers to "loan" (more accurately sell, with a right and obligation to repurchase) specified cryptocurrencies to Block Earner in return for interest paid at a fixed rate over the term of the loan (PJ[11], CAB 11, PJ [19], CAB 18; FC[6], CAB 102). The **Terms** of Use agreed by each user and Block Earner were to the effect that at the commencement of the loan Block Earner converted the customer's AUD in their Block Earner account, in the amount nominated by the customer, into a cryptocurrency nominated by the customer (Bitcoin, ether, USD Coin or Paxos Gold). At the end of the loan, the customer was entitled to a return of AUD to their Block Earner account calculated by reference to the price of the relevant cryptocurrency, plus a fixed rate return (PJ[19], CAB 18; FC[28], CAB 107-108; FC [36], CAB 109). That is, as well as receiving the fixed rate of return, which was described as the yield (being equivalent to interest), the customer <u>also</u> benefitted from or suffered from any change in the AUD value of the nominated cryptocurrency over the term of the loan.

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[1] Another Block Earner product, "Access", was in issue before the primary judge (see PJ[55]-[65], CAB 33-37). The primary judge dismissed the appellant's claim in relation to that product (PJ[73], CAB 41; PJ [79], CAB 43; PJ [84]-[85], CAB 44-45) and the appellant did not challenge that dismissal in the Full Court (FC [8], CAB 103).

9. The Earner product was provided in accordance with the Terms (PJ [16], CAB 12-18; FC [24], CAB 105), which referred to the Earner product as "Lend".

10. Clause 4.3(f) of the Terms relevantly provided in part as follows (PJ [16], CAB 12-18; FC [28], CAB 107-108):

> your Australian dollars in the Account will be exchanged for the nominated Eligible Cryptocurrency under the exchange service. The Eligible Cryptocurrency will then be transferred to Block Earner under Lend.

11. Clause 4.3(j) of the Terms provided (PJ [16], CAB 12-18; FC [28], CAB 107-108):

> Upon the term of the loan of your Eligible Cryptocurrency ending Block Earner will return the borrowed Eligible Cryptocurrency and deliver any interest accrued under the Loan Terms (**Final Amount**), in each case by Block Earner converting the Final Amount to an equivalent value of Australian dollars under the exchange service and this value will be held in the Account.

12. The unchallenged evidence of Block Earner's Chief Executive Officer and co-founder, Charlie Karaboga, which was relied on by ASIC, was that (see PJ [28], CAB 21; PJ [50], CAB 31; FC [89], CAB 125):

> Block Earner's business model was to loan the cryptocurrency borrowed from users, together with its own cryptocurrency that it had purchased from other sources, to third parties at a higher interest rate than it was paying to Block Earner's users under the 'Terms of Use'. Block Earner's profit was then the difference between the amount of interest it had to pay to the user and the amount it received from the third party. This profit was not paid to the user, who only received the fixed interest rate in cryptocurrency as agreed with Block Earner.

13. The same link between the on-lending and the return paid to investors was also drawn in the marketing materials on Block Earner's website in answer to the "frequently asked question" (or FAQ) "How is fixed yield generated?" There, Block Earner stated "Block Earner is able to generate returns by pooling customer funds and lending it to our trusted partners, who are all vetted in accordance with our risk policy, thereby receiving a favourable yield rate" (BFM 71; see PJ [29], CAB 21-22; FC [21]-[22], CAB 105).

Procedural history

14. ASIC commenced proceedings against Block Earner relevantly alleging that the Earner product was a "financial product" because it was: (i) a managed investment scheme;[2]

[2] As defined in s 9 of the Act.

(ii) a facility through which a person makes a financial investment;[3] or (iii) a derivative.[4] It was common ground that, if the Earner product was a financial product, then Block Earner had contravened s 911A of the Act by carrying on a financial services business without holding an AFSL (PJ [3], CAB 8; FC [4], CAB 102).

15. The primary judge found that the Earner product was both a managed investment scheme (PJ [40]-[44], CAB 27-29) and a facility through which a person makes a financial investment (PJ [49], CAB 31). His Honour therefore did not need to deal with whether the Earner product would have been a derivative had it not been a managed investment scheme (PJ [54], CAB 33; FC [7], CAB 103).[5] The primary judge made declarations that Block Earner had contravened both ss 911A and 601ED of the Act. However, after a separate hearing on penalty, the primary judge gave reasons[6] relieving Block Earner under s 1317S(2) of the Act from liability to pay a pecuniary penalty.

16. ASIC appealed to the Full Court in respect of the penalty judgment. Block Earner cross-appealed from the primary judge's declarations of contravention. By Notice of Contention, ASIC contended that the primary judge's finding of contravention of s 911A could also be supported on the alternative basis that the Earner product was a derivative.

17. The Full Court allowed Block Earner's Cross-Appeal, set aside the primary judge's declarations of contravention, consequently dismissed ASIC's appeal on penalty and dismissed the proceeding. The Full Court held that the Earner product: was not a managed investment scheme within the meaning of s 9 (FC [64], CAB 118; FC [77], CAB 121); was not a facility through which a person makes a financial investment under s 763B (FC [101], CAB 128); and was not a derivative within the meaning of s 761D (FC [138], CAB 137-138). In this appeal, ASIC challenges the second and third of those conclusions: ie that the Earner product was not a facility through which a person makes a financial investment; and was not a derivative.

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3 Act, ss 763A(1)(a), 763B.
4 Act, ss 761D (read with s 761B), 764A(1)(c).
5 By s 761D(3)(c) of the Act, managed investment schemes are excluded from the definition of derivative.
6 *Australian Securities and Investments Commission v Web3 Ventures Pty Ltd (Penalty)* (2024) 42 ACLC 24-002; [2024] FCA 578.

PART VI: ARGUMENT

Investment facility (s 763B(a)(i) or (iii))

18. Chapter 7 of the Act creates the regime for the regulation of financial products in Australia. Section 763A(1) relevantly provides that "a ***financial product*** is a facility through which, or through the acquisition of which, a person does one or more of the following: (a) makes a financial investment; (b) manages financial risk; (c) makes non-cash payments". Section 763B of the Act then sets out the meaning of "makes a financial investment" in the following terms:

> **When a person makes a financial investment**
>
> For the purposes of this Chapter, a person (the ***investor***) ***makes a financial investment*** if:
>
> (a) the investor gives money or money's worth (the ***contribution***) to another person and any of the following apply:
>
> (i) the other person uses the contribution to generate a financial return, or other benefit, for the investor;
>
> (ii) the investor intends that the other person will use the contribution to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated);
>
> (iii) the other person intends that the contribution will be used to generate a financial return, or other benefit, for the investor (even if no return or benefit is in fact generated); and
>
> (b) the investor has no day-to-day control over the use of the contribution to generate the return or benefit.

19. It was common ground in the proceedings below that the chapeau to s 763B(a) and paragraph (b) were satisfied. However, the Full Court held that s 763B(a)(i) was not satisfied because it found that Block Earner used the contribution to generate a financial return <u>for itself</u>, rather than <u>for the investor</u> (FC [90]-[91], CAB 125-126). The determinative reasoning was very brief. The Full Court said (FC [90], CAB 125-126, emphasis added):

> Block Earner used the money or money's worth given by investors to generate a financial return "<u>for</u>" itself, and to benefit itself. It did not use those contributions to generate a financial return or other benefit "<u>for</u>" the investors. The contrary conclusion conflates the generation of a return that would enable Block Earner to meet its obligations to its users with the generation of a return or other benefit "<u>for</u>" those users.

20. The Full Court held that s 763B(a)(iii) was not satisfied for similar reasons (FC [93], CAB 126). By appeal ground one, ASIC challenges those conclusions. In particular, it challenges the proposition that the fact that Block Earner received (and intended to receive) a benefit for itself prevent the Earner product from falling within s 763B(a).

21. In summary, the Full Court erred in reaching that conclusion for the following reasons:

(a) *first*, the Full Court's reasoning fails to give effect to the ordinary meaning of the words in s 763B(a), and in particular depends upon a dichotomy that cannot be reconciled with that text (by assuming that a financial benefit can be generated only for either the investor or the issuer, rather than for both);

(b) *secondly*, the Full Court's construction of s 763B is at odds with the structure and objects of Chapter 7, which uses broad definitions to ensure that the framework it creates is capable of flexible implementation and that it captures emerging products; and

(c) *thirdly*, the Full Court's construction of s 763B is inconsistent with the explicit statement in the Revised **Explanatory Memorandum** to the Financial Services Reform Bill 2001 (**FSR Bill**) that s 763B was intended to cover deposit accounts.[7]

Ordinary meaning of the text

22. The critical question of construction concerns the meaning of the word "for" in the phrase "for the investor" in s 763B(a). The answer to that question depends on the ordinary meaning of the words, read in their statutory context and in light of their purpose. The Full Court failed to give effect to that ordinary meaning, by postulating a dichotomy between a person using a contribution to generate a return for the investor and a person using a contribution to generate a financial return for themselves.

23. The word "for" is a common preposition. As the Full Federal Court observed in *ASIC v* ***BHF Solutions*** *Pty Ltd*,[8] "[l]ike all prepositions, it expresses a relationship between two things. It is a protean word in that its meaning, being the nature of the relationship expressed, is governed by the nouns or verbs it connects."

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7 Explanatory Memorandum, *Financial Services Reform Bill 2001* at [6.58].
8 (2022) 293 FCR 330 at [156] (O'Bryan J, Besanko and Lee JJ agreeing).

24. As a matter of ordinary language, where a verb follows the preposition "for", then it often connotes a causal relationship, such that one action is the result of another action. Thus, the first defined meaning of "for" in the Macquarie Dictionary is "with the object or purpose of", and the word can also mean "by reason of, or because of". However, where the preposition is followed by a noun (specifically, a person), it often has its second defined meaning, being "intended to belong to, suit the purposes or needs of" (as, for example, in the phrase "I have a parcel for Jack"). In s 763B(a), the context in which the word "for" appears strongly suggests that this is at least the primary way in which the word is used in the phrase "to generate a financial return … for the investor". That said, of course, it may bear such of its other ordinary meanings as are "appropriate in particular factual contexts".[9] There is no principle of statutory construction that requires a word to be given a single meaning where it ordinarily conveys a range of meanings.[10]

25. There is no difficulty with a single action being done "for" multiple people or purposes.[11] For example, a person might purchase a property both as an investment for themselves and to provide a place for their children or parents to live. Once that basic point is recognised, it is readily apparent that a person can, at the same time, use a contribution to generate a return both for the investor and for themselves. Indeed, as is developed below, that is what occurs every time a bank lends funds which have been deposited in an interest-bearing account at a rate of interest that is sufficient both to generate the necessary return for the depositor and to generate profit for the bank itself.

26. That interpretation is supported by Note 1(a) to s 763B, which indicates that a person will make a financial investment where they pay money to a company for the issue of shares in the company. As Note 1(a) explains, in that situation "the company uses the

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9 (2022) 293 FCR 330 at [159], [172] (O'Bryan J, Besanko and Lee JJ agreeing). See also *R v Khazaal* (2012) 246 CLR 601 at [31] (French CJ).

10 *Alumina and Bauxite Company Ltd v Queensland Alumina Ltd* (2024) 171 ACSR 556 at [234], approved on appeal in *Alumina and Bauxite Company Ltd v Queensland Alumina Ltd* (2024) 306 FCR 86 at [199].

11 The law recognises this in many different contexts: see, eg, *Mills v Mills* (1938) 60 CLR 150 at 185-186 (Dixon J); *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 at 257 (Mason, Deane and Dawson JJ); *Walton v ACN 004 410 833 Limited (formerly Arrium Limited) (in liquidation)* (2022) 275 CLR 508 at [170] (Edelman and Steward JJ); *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [61] (Gleeson CJ, Gaudron and Gummow JJ); *Thompson v Randwick Corporation* (1950) 81 CLR 87 at 106 (Williams, Webb and Kitto JJ); *Rajski v Carson* (1988) 15 NSWLR 84 at 89 (Kirby P and Hope JA), 103 (Mahoney JA); *Crofter Hand Woven Harris Tweed Company Ltd v Veitch* [1942] AC 435 at 445 (Viscount Simon LC).

money to generate dividends for the person". Two observations may be made. *First*, given that example, the relationship between the "other person" generating the financial return and "the investor" signified by the word "for" must, at least, include relationships in which the benefit is generated for other persons in addition to the investor (ie the company as well as the investor). *Secondly*, in the example given, the financial return or other benefit that is generated "for the investor" may or may not actually be received by the investor even if a return is generated, because the declaration of a dividend by a company is both subject to limitation (s 254T) and otherwise substantially within the decision-making freedom of the directors. Accordingly, the relationship between the generation of the financial return and the investor was clearly intended to be broad, and to include situations in which a financial benefit is generated but there is no enforceable obligation to give any or all of that benefit to the investor.

27. The possibility of a return being generated "for" multiple people is further reinforced by the fact that s 763B(a) requires only that "a" financial return is generated for the investor. It does not require the "other person" (ie the person who "uses the contribution") to pass on the whole of the return to the investor. That is unsurprising, bearing in mind the statutory focus in Ch 7 on market or economic usage, because it would be unusual that the issuer of a product that otherwise has the characteristics of a financial product would pass on the whole of a benefit without some form of fee, commission or profit generated by the product. Instead, the issuer usually (if not invariably) will be acting in its own commercial interests.

Statutory context

28. Section 763B is one of the core definitions in Ch 7 of the Act. It establishes what constitutes a facility through which a person "makes a financial investment", which in turn is one of the three core concepts that governs the meaning of "financial product" in s 763A. As such, s 763B is one of the gateway sections that controls the application of Ch 7, and the capacity of that Chapter to achieve the objects identified in s 760A.[12] As s 760A states, the "main object" of Chapter 7 is to promote, *inter alia*, "confident and informed decision making by consumers … while facilitating efficiency, flexibility and innovation", "the provision of suitable financial products to consumers" and "fair,

[12] See *Acts Interpretation Act 1901* (Cth) s 15AA; *Disorganized Developments Pty Ltd v South Australia* (2023) 97 ALJR 575 at [15] (Kiefel CJ and Gageler, Gleeson and Jagot JJ, Steward J agreeing at [47]).

orderly and transparent markets for financial products". That purpose is undermined if the fact that an "other person" seeks to generate a financial return for themselves, as well as for an investor, takes them outside s 763B(a). Indeed, the Full Court's interpretation of s 763B in effect prevents it from applying to interest earning products. Unless overturned, that would allow future products (particularly those designed not to trigger the debenture or derivative definitions) to escape financial services regulation. That is manifestly contrary to the objects of Ch 7.

29. It is of note that, in the related context of managed investment schemes (such schemes being another financial product regulated under Ch 7), one component of the definition of such a product requires contributions to be pooled to produce financial benefits "for the people (the ***members***) who hold interests in the scheme" (s 9). Schemes under which promoters pooled member funds in order to invest them, in circumstances where the members were entitled only to receive fixed interest on their contribution (with the promoter retaining any additional profits from the investment), have been held to meet that definition.[13] The Full Court distinguished those cases on the basis that they "all had as a central element of the scheme in fact being offered to investors an interest in or exposure to the underlying business activities of the promoter" (FC [63], CAB 118). That is incorrect. In all three cases, investors were entitled to receive only fixed interest, yet the schemes were held to involve pooling contributions to produce financial benefits "for" the investors. There is no justification for taking a different approach to s 763B(a).

30. The "three-part approach" to the definition of "financial product" was intended to provide significant flexibility in defining financial products to cater for emerging products without the need to amend the legislation.[14] In that way, Parliament sought to ensure that Ch 7 responds to a fluid market and economic usage.[15] Recognising as much, the joint reasons of this Court in *International Litigation Partners Pte Ltd v* ***Chameleon*** *Mining NL (Receivers and Managers Appointed)*[16] noted that the legislative scheme of Chapter 7 has "two significant characteristics":

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13 *Waldron v Auer* [1977] VR 236; *ASIC v Hutchings* (2001) 38 ACSR 387; *ASIC v Pegasus Leveraged Options Group Pty Ltd* (2002) 41 ACSR 561.

14 Explanatory Memorandum at [6.45].

15 *Chameleon* (2012) 246 CLR 455 at [5].

16 (2012) 246 CLR 455 at [5] (French CJ, Gummow, Crennan and Bell JJ) (emphasis added). See also Explanatory Memorandum at [6.44]. See also Financial System Inquiry, *Final Report* (March 1997) (**Wallis Report**) at 7 (recommendation 19); Corporate Law Economic Reform Program, *Paper No 6: Financial Markets and Investment Products* (1997) at 40.

> One is overinclusiveness. Rights and liabilities are drawn in overtly broad terms, on the footing that instances of overreach which become apparent in the administration of the legislation may be remedied by adjustments to the Act made not by remedial legislation but by exercise of powers conferred upon the Executive Government or bodies such as the Australian Securities and Investments Commission. The second characteristic is the creation by the legislation of rights and liabilities by means of criteria which reflect fluid market and economic usage rather than any ascertainable and stable meaning in the law.

31. The two characteristics of Ch 7 identified in that passage point strongly against giving a narrow construction to s 763B, with consequent narrowing of the general definition of "financial product" in s 763A. Those characteristics suggest that the correct approach is to give the breadth of those definitions full effect, with any overreach addressed through delegated legislation.[17] As the New South Wales Court of Appeal put it in *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943*,[18] a power to exempt by regulation tends in favour of giving a broad operation to the primary definition because "the legislature made provision for any overreaching operation … to be readily addressed".

Extrinsic materials and deposit accounts

32. The above approach is reinforced by the relevant extrinsic material.[19] The FSR Bill, which introduced Chapter 7, was the legislative response to a number of recommendations of the Financial System Inquiry (the **Wallis Inquiry**).[20] The Corporate Law Economic Reform Program (**CLERP**) was established in tandem with the Wallis Inquiry, under which the Government released policy papers, including CLERP Paper No. 6 (**CLERP 6**).[21] CLERP 6 made nine proposals, including the

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17 Both ASIC (by declaration) and the Governor-General (by regulation) may exempt a specific product from the definition of "financial product": for ASIC's power, see ss 765A(1)(z) and 765A(2); and for the Governor-General's power, see ss 765A(1)(y) and 765A(3), read with the regulation-making power in s 1364(1).

18 (2014) 88 NSWLR 488 at [87] (Leeming JA, Basten JA agreeing).

19 To which reference may be made pursuant to *Acts Interpretation Act 1901* (Cth), s 15AB(1); see *Palmanova Pty Ltd v Commonwealth* (2025) 99 ALJR 1362 at [6] (Gageler CJ, Gordon, Jagot and Beech-Jones JJ), quoting *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 at [87] (Kiefel CJ, Gageler, Gordon, Steward and Gleeson JJ).

20 Explanatory Memorandum at [1.2].

21 Explanatory Memorandum at [2.8], referring to CLERP, Proposal for Reform: Paper No. 6, "Financial Markets and Investment Products: Promoting Competition, financial innovation and investment" (December 1997) (**CLERP 6**).

introduction of "an integrated regulatory framework for financial instruments" which would provide "consistent regulation of functionally similar markets and products".[22]

33. In CLERP 6, it was noted that "[a] new definition of financial instruments will include all securities and derivatives, superannuation, life and general insurance, foreign exchange and deposit accounts" (emphasis added).[23] In explaining the implementation of that approach, the Explanatory Memorandum to the FSR Bill, in discussing s 763B, observed that "[b]y focusing on the actual, as well as the intended, use of the money the definition is intended to cover deposit accounts, which for many consumers are used for transactional purposes, although they also generate some return" (emphasis added).[24]

34. Money standing in a deposit account is a chose in action to which the depositor is entitled.[25] It is a loan by a depositor to the bank which the bank can use for its own purposes.[26] The relationship between the depositor and the bank is that of debtor and creditor.[27] Banks derive profits from their "net interest margin".[28] That is, banks derive profits from on-lending funds deposited with them at higher rates of interest than they are obliged to pay their depositors. By expressing the intention that s 763B would cover deposit accounts, the Explanatory Memorandum indicates that a product by which a person derives profit from on-lending funds deposited with them at higher rates of interest than they are obliged to pay their depositors was intended to be within the definition in s 763B.

35. Block Earner's business model for the Earner product involved the functionally equivalent elements to a standard bank's business model in respect of a deposit account. Block Earner derived profit from on-lending funds deposited with it, at higher rates of

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22 CLERP 6 at 45 (Proposal No. 1).

23 CLERP 6 at 44 (emphasis added); see also at 45 (Proposal No. 1).

24 Explanatory Memorandum at [6.58] (emphasis added).

25 *Russell v Scott* (1936) 55 CLR 440 at 450-451 (Dixon and Evatt JJ); *Parson v The Queen* (1999) 195 CLR 619 at [17] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ), quoting *Croton v The Queen* (1967) 117 CLR 326 at 330-331 (Barwick CJ).

26 *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 127 (Atkin LJ), applied in *National Australia Bank Ltd v KDS Construction Services Pty Ltd* (1987) 163 CLR 668 at 676 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

27 *Russell v Scott* (1936) 55 CLR 440 at 450-451 (Dixon and Evatt JJ).

28 See Reserve Bank of Australia, *Banks' Funding Costs and Lending Rates* (accessed 21 October 2025) https://www.rba.gov.au/education/resources/explainers/pdf/banks-funding-costs-and-lending-rates.pdf for an overview. The function of banks to earn profits by redistributing savings from depositors to lenders is one of the basis tenets of economic banking theory, see the canonical model in Diamond, Douglas W and Dybvig, Philip H, "Bank runs, deposit insurance, and liquidity" (1983) 91 *Journal of Political Economy* 401 (for which the authors received the Nobel Prize in Economics in 2022).

interest than it was obliged to pay its depositors. Indeed, unlike a bank deposit account, Block Earner's business model explicitly and directly connected the use of the investor's contribution with the return paid to the investor. The same direct link was also drawn in the marketing materials on Block Earner's website (see above at [13]).[29] For that reason, the Earner product is even more obviously a financial product than is a bank deposit account. Yet, on the Full Court's approach, both would fall outside s 763B.

Factual application

36. In light of the ordinary meaning of the text of s 763B(a), read in context and in light of its purpose, and having regard to the unchallenged evidence, this Court should hold that the Earner product was a facility through which a person "makes a financial investment" within the meaning of s 763B(a)(i) and (iii) of the Act.

37. As to s 763B(a)(i), under cl 4.3(a) of the Terms, users acquired the Eligible Cryptocurrency through the Exchange service and lent it to Block Earner (PJ [16], CAB 12-18). That was "the contribution". Users gave the contribution to Block Earner "in return for daily interest payments paid in the same Eligible Cryptocurrency loan to Block Earner" (PJ [16], CAB 15; cl 4.3(a)). The rate of those daily interest payments was calculated by Block Earner, which reserved the right to amend the rate from time to time with seven days' notice (PJ [16], CAB 15; cl 4.3(c)). Those interest payments constituted, and were intended to constitute, a "financial return … for the [users]".

38. As already noted (above at [12]), Mr Karaboga's evidence was that Block Earner's business model was to on-lend the user's loaned cryptocurrency, together with its own cryptocurrency, to third parties at higher interest rates than the fixed rates it was obliged to pay to the users of the Earner product, and its profit was the difference between those rates (PJ [28], CAB 21; PJ [50], CAB 31; FC [89], CAB 125). Thus, Block Earner used the cryptocurrency both to generate a financial return for the investor (the fixed rate) and to generate a profit for itself (the margin or differential between interest rates).

39. Contrary to the Full Court's reasoning, the conclusion that the Earner product is captured by s 763B(a) does not "conflate the generation of a return that would enable Block Earner to meet its obligations to its users with the generation of a return or other

[29] See PJ[29], CAB 21-22; FC[21]-[22], CAB 105.

benefit 'for' those users" (FC[90], CAB 125-126). There is nothing in the language of s 763B(a) to suggest that it does not apply to the generation of a financial return that the "other person" is obliged to pay to the investor. Nor is there any suggestion in the statutory language that it does not apply to a fixed rate return. The express intention to include deposit accounts shows otherwise.

40. In any case, in addition to the fixed rate return, there was another return that Block Earner generated or was intended to generate for the investor. It was the potential increase in value of the nominated cryptocurrency over the term of the loan, which Block Earner promised to pass on fully to the investor when returning the value of the cryptocurrency in AUD to the investor at the end of the term: Clause 4.3(j) of the Terms (PJ[16], also [19], CAB 16, 18; FC[28], CAB 107-108).

41. As to s 763B(a)(iii) – the fact that a person (Block Earner) intended that contributions would be used to generate a financial return for the investors was also sufficient to establish that the investors made a financial investment. In applying s 763B(a)(iii) to the facts, the Court's attention cannot properly be confined to a consideration of the Terms.[30] It must also take into account the evidence that Block Earner both used, and intended to use, the contribution to generate a financial return both for the investor and for itself. Clause 4.3(l)(iii) of the Terms and Mr Karaboga's evidence were not, as the Full Court held, "flatly inconsistent" with Block Earner holding an intention that investors' contributions would be used to generate a financial return for investors (cf FC[93], CAB 126). Instead, the primary judge correctly understood that both cl 4.3(l)(iii) of the Terms and the evidence as to Block Earner's business model indicated not that Block Earner would not use the contribution to generate a financial return for the investor, but rather that Block Earner would pass on to investors only the fixed yield (PJ[43], CAB 112; FC[69], CAB 119-120).

Derivative (s 761D(1)(c) and s 761B)

42. In the alternative, ASIC contends that the Earner product was a derivative (FC [102], CAB 128).

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[30] As was observed in by Derrington J in *ASIC v Secure Investments Pty Ltd (No 2)* (2020) 148 ACSR 154; [2020] FCA 1463 at [52].

43. The term "derivative" is defined in s 761D of the Act. In the Full Court it was common ground that each of s 761D(1)(a) and (b) were satisfied and that sub-sections (2) and (3) of the definition were not applicable (FC[119], CAB 133). Only s 761D(c) was in issue, which relevantly provides that a derivative is an "arrangement" in relation to which "the amount of the consideration … varies by reference to (wholly or in part) the value or amount of something else, including, for example, one or more of … (i) an asset; (ii) a rate (including an interest rate or exchange rate); (iii) an index; (iv) a commodity".

44. ASIC contends that s 761D(1)(c) is satisfied because the amount of consideration given by Block Earner to users, measured in AUD (the currency received by the user at the end of the investment), varied by reference to the value of the chosen cryptocurrency. The conversion back to AUD was part of the relevant arrangement either because it was part of the arrangement as properly construed or because s 761B requires that the two arrangements (Earner and the conversion back to AUD) be treated as if they together constituted a single arrangement.

45. The Full Court held that Block Earner was not a derivative because the amount of the consideration was to be measured in cryptocurrency, in effect treating the return to users as the cryptocurrency and not its AUD value (such that the amount of the consideration did not vary by reference to the value of something else). The Full Court reasoned that:

    (a) under the Terms, the conversion from cryptocurrency back to AUD was via the Exchange service, which it characterised as an "optional and distinct service" that was not part of the Earner product (FC[126]-[128], CAB 134-135; FC [130], CAB 136; FC [133]-[134], CAB 137); and

    (b) the Earner product and the Exchange service were not to be treated as if they together constituted a "single arrangement" under s 761B (set out below at [50]) because it was not reasonable to assume that Block Earner and its customers regarded them as constituting a single scheme. That was said to be so because the customer could elect not to use the Exchange service, either when signing up to the Earner product or upon termination or expiry (FC[132]-[138], CAB 136-138).

46. In support of both aspects of the above reasoning the Full Court relied upon an agreed fact that some users exiting the Earner product held their cryptocurrency on the Block

Earner platform, rather than having their cryptocurrency converted back to AUD (FC[38], CAB 110; FC [130], CAB 136; FC [136], CAB 137).

The arrangement

47. Turning first to the arrangement, the parties agreed that the Earner product was provided in accordance with the Terms (PJ[16], CAB 12-18; FC[24], CAB 105). By cl 4.3(j) of the Terms (see above at [11]), the Earner product involved a mandatory conversion of cryptocurrency back to AUD as part of exiting the product. The Terms provided no mechanism for exiting the Earner product by receiving a transfer of the cryptocurrency instead of AUD.

48. The financial product in respect of which ASIC commenced proceedings was, therefore, a product that always required the conversion of cryptocurrency back to AUD (see Concise Statement at [9]-[11]). That the Terms may have described "Lend" (aka Earner) as a narrower set of steps – by inserting the qualification that the conversion back to AUD required by cl 4.3(j) was "under the exchange service" – does not mean that the "arrangement" referred to in s 761D did not include the conversion back to AUD. In particular, the fact that the Terms require the use what the Terms described as a different service does not mean there are two arrangements. Indeed, to hold that a product could avoid regulation as a "derivative" under Ch 7 so easily would be wholly inconsistent with the purpose of Ch 7 and the broad and flexible drafting technique it reflects.

49. An additional point ought also be made regarding the Terms: cl 4.1(c) provided that "[o]nce Block Earner receives a user's fiat deposit in the Account, the user is permitted to nominate whether the user wishes to participate in the access service or [Earner]" (PJ[16], CAB 15; FC[27], CAB 106). That is, the nomination of whether the user wished to participate in the Earner product was made at the stage of the customer having AUD in their account, not at the stage of the customer having cryptocurrency in their account. This tells further against the Full Court's view that the exchange service was a "distinct process". Instead, it was a process that only occurred after the customer had already agreed to participate in the Earner product.

A single arrangement by reason of s 761B

50. Alternatively, if the conversion to AUD were a separate arrangement to the Earner product, the two arrangements are nevertheless to be treated as if they together constituted a single arrangement by reason of s 761B. That section provides:[31]

> For the purposes of this Part, if
>
> (a) an arrangement (as defined in subsection (1)), when considered by itself, does not constitute a derivative, or some other kind of financial product; and
>
> (b) that arrangement, and one or more other arrangements, if they had instead been a single arrangement, would have constituted a derivative or other financial product; and
>
> (c) it is reasonable to assume that the parties to the arrangements regard them as constituting a single scheme;
>
> the arrangements are, for the purposes of this Part, to be treated as if they together constituted a single arrangement.

51. In the present case, at the time when the Terms were agreed to, the conversion of cryptocurrency to AUD using the Exchange service was the mechanism, required by the Terms of the Earner product, by which users were to enter and exit the Earner product at the start and end of the loan term. In those circumstances, it is reasonable to assume that Block Earner and its investors regarded the Earner product and the Exchange service as constituting a single scheme. For that reason, s 761B was engaged.

52. Section 761B only operates where there are two arrangements; it is in effect an anti-avoidance provision. For that reason, the Full Court was wrong to hold that "even if all users of the Earner service had to use the Exchange service at the end of the loan of their cryptocurrency, the compulsion to use that service does not make it part of 'a single scheme'" (FC[135], CAB 137). In so holding, the Full Court asked itself the wrong question, because the correct statutory question is not whether there was a single scheme, but rather whether "it is reasonable to assume that the parties to the arrangements regard them as constituting a single scheme". In circumstances where the

[31] Section 761B was amended with effect from 20 October 2023, but the amendment did not change the substance of the provision.

Terms governing the Earner product involved a mandatory conversion back to AUD at the end of the "loan" using the Exchange service, it is reasonable to assume that the parties to the arrangements regarded the "loan" and the mandatory conversion back to AUD as constituting a single scheme.

The irrelevance of the agreed fact as to withdrawals

53. The question whether the Earner product was a derivative has a critical temporal aspect, which exists because, in order to have contravened ss 911A(1) and (5B), Block Earner must have carried on a financial services business. Carrying on such a business includes dealing in a financial product (s 766A(1)(b)). "Dealing" includes "issuing" a financial product (s 766C). A financial product is "issued" each time it is "first issued, granted or otherwise made available to a person" (emphasis added). Finally, a derivative is issued to a person when "the person enters into the legal relationship that constitutes the financial product" (s 761E(2), emphasis added).[32]

54. In light of those definitions, the relevant time at which to determine whether the Earner product was a derivative was the time at which a user entered into the legal relationship that constituted the Earner product. It was not when a user decided to exit the Earner product, because by then the above definitions would already have applied to determine whether Block Earner was carrying on a financial services business.

55. For the above reason, it does not matter that the parties jointly submitted an agreed fact that some users in fact exited the Earner product in AUD and some exited in cryptocurrency (cf FC[136], CAB 137; see also FC [38], CAB 110; FC [130], CAB 136; FC [137], CAB 137; Narrative of Agreed Facts [19], BFM 71). Nor does it matter that there was evidence that, from September 2022, "the website functionality was changed so that users wishing to end a loan could access instructions on how to have their cryptocurrency transferred to them in kind." (FC[38], CAB 110; see also FC [40], CAB 110; FC [129]-[130], CAB 135-136). The instances where users exited the Earner product without a conversion back to AUD were (correctly) found by the primary judge to be "ad hoc variations" to the Terms (PJ[23], CAB 19; FC [39], CAB 110). Such ad hoc variations, occurring after a financial product is issued, do not alter the character of the arrangement as a derivative.

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[32] See *ASIC v Bit Trade Pty Ltd* [2024] FCA 953 at [45] (Nicholas J).

56. Finally, s 761D(a), which the parties agreed was satisfied, requires that under the relevant arrangement a party must or may be required to provide consideration of a particular kind at some future time. Even if it is accepted that the subsequent ad hoc variations could be relevant to the construction of the initial arrangement, it was nonetheless the case that, at the time when users and Block Earner entered into the Terms, Block Earner was required or may have been required to provide consideration in AUD (as was provided for in the Terms). That is true even though some users, rather than requiring performance of cl 4.3(j), may have chosen to agree an ad hoc variation of the Terms whereby the user could exit the Earner product in cryptocurrency. For that reason, at the time the Earner product was issued it, it was a derivative. It was an arrangement under which the user may have required Block Earner to honour the Terms and provide consideration in an amount the value of which varies by reference to the value of something else. The Full Court erred in finding otherwise.

PART VII: ORDERS SOUGHT

57. The orders sought are as follows:

1. Appeal allowed.

2. Set aside the orders of the Full Court of the Federal Court of Australia made on 22 April 2025, and, in their place, order that:
   (a) The cross-appeal be allowed in part.
   (b) The declaration of contravention in order 2 of the orders made by the primary judge on 4 June 2024 be set aside.
   (c) The cross-appeal otherwise be dismissed.
   (d) Each party to bear its own costs of the cross-appeal.

3. The proceeding be remitted to the Full Court of the Federal Court of Australia for determination of the appellant's appeal against the penalty judgment (*ASIC v Web3 Ventures Pty Ltd* [2024] FCA 578).

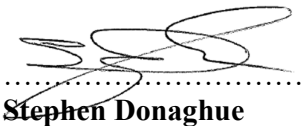
4. The appellant pay the respondent's costs of and incidental to the appeal in this Court.

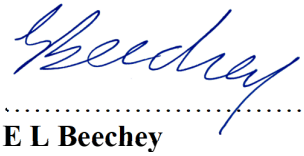
58. Proposed order 4 is consistent with the undertaking provided to the Court by ASIC to pay the respondent's costs of and incidental to the appeal in this Court.

PART VIII: TIME REQUIRED FOR PRESENTATION OF ARGUMENT

59. ASIC estimates that it will need up to 1.5 hours for oral submissions in chief and 45 minutes in reply (including responding to the Notice of Contention).

Dated: 23 October 2025





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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

S136 of 2025

BETWEEN:

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION
Appellant

and

WEB3 VENTURES PTY LTD ACN 655 090 869
Respondent

ANNEXURE TO THE SUBMISSIONS OF THE APPELLANT

Pursuant to Practice Direction No.1 of 2024, the appellant sets out below a list of the constitutional provisions, statutes and statutory instruments referred to in these submissions.

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
		Statutory provisions			
Commonwealth statutes					
1.	*Acts Interpretation Act 1901* (Cth)	Compilation No. 19 (1 January 2005 to 21 February 2005)	Sections 15AA, 15AD	Act in the form it applied to the *Corporations Act 2001* (Cth) during the period of the contraventions of that Act alleged by the appellant, by reason of former s 5C of the *Corporations Act 2001* (Cth)	17 March 2022 to 16 November 2022

No.	Description	Version	Provisions	Reason for providing this version	Applicable date or dates
2.	*Corporations Act 2001* (Cth)	Compilation No. C120 (1 Oct 2022 to 28 February 2023)	Sections 5C, 9 (definition of managed investment scheme), 254T, 601ED, 760A, 761B, 761D, 761E, 763A, 763B, 764A 765A, 766A, 766C, 911A, 1317S, 1364	Act in force at the end of the period of the alleged contraventions, with no relevant changes from Compilations Nos C114-C119 in force during the balance of the period of the alleged contraventions	17 March 2022 to 16 November 2022